LIBRARY
SUPREME COURT, U. S.
MAY 8
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1974
No. 74-1272

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner

vs.

THE HONORABLE A. LEON HIGGINBOTHAM, JR., Judge of the United States District Court for the Eastern District of Pennsylvania,
Respondent

and

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT P. KANE
Attorney General
BURTON MORRIS
Deputy Attorney General
Department of Justice
Capitol Annex
Harrisburg, Pa. 17120
Counsel for Respondent Commonwealth of Pennsylvania

HAROLD I. GOODMAN
MARK B. SEGAL
CASSANDRA M. MENOKEN
Community Legal Services, Inc.
Sylvania House
Juniper & Locust Streets
Philadelphia, Pa. 19107
ROBERT J. REINSTEIN
Temple University
School of Law
1715 North Broad Street
Philadelphia, Pa. 19122
Counsel for Individually Named and Class Respondents

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

	PAGE
I. Questions Presented	2
II. Counter-Statement of the Facts	3
III. Reasons for Denying the Writ:	
A. The decision of the District Judge below was correct	6
B. The decision below does not conflict with this Court's decision in Berger v. United States, 255 U.S. 22 (1921)	9
C. This case does not present a conflict among the circuits for this Court to resolve	10
IV. Conclusion	12

TABLE OF CITATIONS

CASES:

Baskin v. Brown, 174 F. 2d 391 (4th Cir. 1949) 7, 9

Berger v. United States, 255 U.S. 22 (1921) 2, 6, 7, 9, 10, 12, 13

Commonwealth of Pennsylvania and Raymond Williams et al. v. Local 542, International Union of Operating Engineers, AFL-CIO et al. (E.D. Pa., Civil Action No. 71-2698) 3

Ex Parte N. K. Fairbank Co., 194 F. 978 (M.D. Ala. 1912) 7

F.C.C. v. WJR, The Goodwill Station, 337 U.S. 265 (1949) 12

Inland Freight Lines v. United States, 202 F. 2d 169 (10th Cir. 1953) 6

Knapp v. Kinsey, 232 F. 2d 458 (6th Cir.), rehearing denied, 235 F. 2d 129, cert. denied, 352 U.S. 892 (1956) 9

Laird v. Tatum, 409 U.S. 824 (1972) 7, 9

NLRB v. Local No. 42, International Association of Heat and Frost Insulators and Asbestos Workers, —— F. 2d ——, 16 F. R. Serv. 2d 1583 (3rd Cir. 1973) 12

Parker Precision Products Co. v. Metropolitan Life Insurance Co., 407 F. 2d 1070 (3rd Cir. 1969) 7, 8

Parrish v. Board of Commissioners of Alabama State Bar, 505 F. 2d 12 (5th Cir. 1974) 6

Price v. Johnston, 125 F. 2d 806 (9th Cir.), cert. denied, 316 U.S. 677 (1942) 7, 8

United States v. Gilboy, 162 F. Supp. 384 (M.D. Pa. 1958) 7

United States v. Grinnel Corp., 384 U.S. 563 (1966) 9

United States v. Townsend, 478 F. 2d 1072 (3rd Cir. 1973) 6, 10

MISCELLANEOUS:

All Writs Statute, 28 U.S.C. Sec. 1651 11

Civil Rights Act of 1964:

Title VI, 42 U.S.C. Sec. 2000d, et seq. 3

Title VII, 42 U.S.C. Sec. 2000e, et seq. 3

42 U.S.C. Sec. 144 .....2, 3, 6, 8, 11

42 U.S.C. Sec. 1981 3
42 U.S.C. Sec. 1983 3
42 U.S.C. Sec. 1985(3) 3
Labor Management Relations Act of 1947, 29 U.S.C. Sec. 185 5
Pennsylvania Human Relations Act, 43 P.S. Sec. 951 et seq. 3
Rule 21(b) of the F. R. App. Proc. 12
U. S. Constitution, Thirteenth and Fourteenth Amendments 3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974
No. 74-1272

LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS,
Petitioner

vs.

THE HONORABLE A. LEON HIGGINBOTHAM, JR., Judge of the United States District Court for the Eastern District of Pennsylvania,
Respondent

and

COMMONWEALTH OF PENNSYLVANIA and RAYMOND WILLIAMS et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

I. QUESTIONS PRESENTED

1. Was the District Court correct in denying Petitioner's motion for disqualification on the ground that the facts alleged were not legally sufficient under 42 U.S.C. §144?

2. Was the District Court correct in holding that disqualification was not justified in light of this Court's decision in *Berger v. United States*, 255 U.S. 22 (1921)?

3. Did the decision of the Court of Appeals denying a writ of mandamus/prohibition create a conflict of case law among the circuits?

II. COUNTER-STATEMENT OF THE FACTS

The action underlying this controversy was brought by the Commonwealth of Pennsylvania and individual and similarly situated class plaintiffs under various civil rights laws[1] challenging the Petitioner's and other named and class defendants' alleged policy of discriminating in employment against Blacks. *Commonwealth of Pennsylvania and Raymond Williams et al. v. Local 542, International Union of Operating Engineers, AFL-CIO et al.* (E.D. Pa., Civil Action No. 71-2698).

After three years of protracted pretrial procedure involving numerous delays, the trial was finally scheduled to commence on December 16, 1974. Prior thereto, on November 15, 1974, on the eve of the final pretrial conference, the Petitioner moved to disqualify the trial judge, Respondent herein, pursuant to 28 U.S.C. §144 (App. A-1). Accompanying that motion was an affidavit which alleged the following facts: that the trial judge, the Honorable A. Leon Higginbotham, Jr., on October 25, 1974, addressed the annual meeting of the Association for the Study of Afro-American Life and History, Inc.; that

[1] Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, et seq.; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.; 42 U.S.C. §§1981, 1983, 1985(3); Labor Management Relations Act of 1947, 29 U.S.C. §185; U. S. Constitution, Thirteenth and Fourteenth Amendments; Pennsylvania Human Relations Act, 43 P.S. §951, et seq.

during the course of his address, Judge Higginbotham said:

> Today, I do not see the [Supreme] Court of the 1970's or envision the Court of the 1980's as a major instrument for significant change and improvement in the quality of race relations in America.
>
> * * *
>
> . . . As I see it, we must make major efforts in other forums without exclusive reliance on the federal legal process (Pet. at 4).

Petitioner further alleged that Judge Higginbotham's appearance and the above quotation were publicized by the *Philadelphia Inquirer,* a newspaper of general circulation (Pet. at 4).

It was upon these factual allegations alone that the Petitioner based its motion for disqualification; from them, the Petitioner concluded that Judge Higginbotham had demonstrated a personal bias or prejudice against it.

On December 4, 1974 Judge Higginbotham entered an opinion (Pet. App. A-2 to A-143) and order (Pet. App. A-144) denying the motion for disqualification, holding that Petitioner had not alleged facts which were legally sufficient to require recusal.

Thereafter, Petitioner applied to the Court of Appeals for the Third Circuit for a writ of mandamus and/or prohibition. After due consideration, the Court of Appeals entered an order, dated December 30, 1974 denying the petition for the writ (Pet. App. A-145). Petitioner then moved the Court of Appeals

for reconsideration, which was denied in an order, dated January 15, 1975 (Pet. App. A-146 to A-147). Subsequently, Petitioner moved the District Court for a stay of proceedings pending determination by this Honorable Court of its petition for writ of certiorari. The District Court entered an order, dated February 6, 1975 (Pet. App. A-148) denying that motion. Petitioner then moved the Court of Appeals for a stay, which was denied "for want of jurisdiction" in an order, dated February 25, 1975 (Pet. App. A-149 to A-150). Thereafter, Petitioner requested Mr. Justice Brennan, as the Circuit Justice, for a stay, which was also denied in an order dated March 25, 1975.

Finally, on April 9, 1975, Petitioner filed the instant petition for writ of certiorari.

III. REASONS FOR DENYING THE WRIT

A. The Decision of the District Judge Below Was Correct

It is settled law that the mere filing of an affidavit in support of a motion to disqualify, filed pursuant to 28 U.S.C. §144, does not *ipso facto* require recusal. *Berger v. United States*, 255 U.S. 22 (1921); *United States v. Townsend*, 478 F. 2d 1072, 1073 (3rd Cir. 1973). Rather, the statute imposes a duty upon the courts to determine whether the facts asserted in the affidavit give "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment." *Berger*, supra, 255 U.S. 33-34. The statute thus requires a judicial determination of whether the facts, which must be accepted as true, justify the affiant's—here the Petitioner's—belief that the judge who is to try the case is biased or even has the appearance of bias. *Berger*, supra, 255 U.S. 36; *Parrish v. Board of Commissioners of Alabama State Bar*, 505 F. 2d 12, 20-21 (5th Cir. 1974).

Disqualification, as a matter of law, is not warranted if it is grounded on mere conclusions. *United States v. Townsend*, supra, 478 F. 2d at 1074; *Inland Freight Lines v. United States*, 202 F. 2d 169, 171 (10th Cir. 1953). Furthermore, recusal is not required if the facts pled in the affidavit are based on the background and associations of the judge, rather

than on his specific appraisal of a party before him. *Parker Precision Products Co. v. Metropolitan Life Insurance Co.*, 407 F. 2d 1070, 1077-78 (3rd Cir. 1969); *Price v. Johnston*, 125 F. 2d 806, 811 (9th Cir.), *cert. denied*, 316 U.S. 677 (1942).[2] Nor can a judge "be disqualified merely because he believes in upholding the law." *Baskin v. Brown*, 174 F. 2d 391, 394 (4th Cir. 1949). In short, the motion for disqualification must be legally sufficient in order to justify recusal, *Berger*, supra. When it is not, "a federal judge has a *duty* to *sit* where *not disqualified*, which is equally as strong as the duty to *not sit* where *disqualified*." *Laird v. Tatum*, 409 U.S. 824, 837 (1972) (per Mr. Justice Rehnquist) (emphasis in original).[3]

Consistent with that principle, the District Court properly decided to "sit" in this case. A careful analysis of the facts contained in the Petitioner's recusal motion does not even remotely support the

---

[2] "[A judge] must have neighbors, friends and acquaintances, business and social relations, and be part of his day and generation . . . the ordinary results of such associations and the impressions they create in the mind of the judge are not the 'personal bias or prejudice' to which the statute refers." *United States v. Gilboy*, 162 F. Supp. 384, 400 (M.D. Pa. 1958), quoting *Ex Parte N. K. Fairbank Co.*, 194 F. 978, 989-90 (M.D. Ala. 1912).

[3] Mr. Justice Rehnquist's opinion in *Laird v. Tatum*, supra, contains an extended discussion of instances where Supreme Court Justices refused to disqualify themselves from cases where they arguably were prejudiced or biased. *Laird v. Tatum* involved disqualification under 28 U.S.C. §455.

Petitioner's conclusion that Judge Higginbotham is biased or partial against Local 542.[4]

The motion itself was predicated primarily on three factors: (1) that Judge Higginbotham was Black; (2) that he attended and addressed the annual meeting of the Association for the Study of Afro-American Life and History, Inc. (hereinafter "ASALH"); and (3) that the contents of his address revealed an attachment to the Black civil rights movement in America.

Each of these allegations, individually or cumulatively, are not legally sufficient to warrant recusal under 28 U.S.C. §144. First, the fact that Judge Higginbotham is Black is in and of itself insufficient to imply that he is or would be biased in trying a civil rights case. Second, his presence and speech before the ASALH is equally immaterial to the grant or denial of the disqualification motion. *Parker Precision Products Co.*, supra; *Price v. Johnston*, supra. Third, as to the contents of the speech, Judge Higginbotham never once referred to any of the parties to this litigation, the lawsuit itself, or employment discrimination generally. What the speech represented were the Judge's views on how racial equality can best be achieved in the United States without sole reliance on the judiciary. The restraints imposed by law were recognized and nothing illegal was proposed. A

[4] It is interesting to note that the other defendants to this litigation, who had initially joined with Local 542 in its recusal petition, have now declined to press on with this continued attempt to remove Judge Higginbotham from the case.

judge cannot be disqualified based upon remarks such as these, remarks which ultimately represent his fidelity to law enforcement and decisions of this Court. *Knapp v. Kinsey*, 232 F. 2d 458 (6th Cir.), *rehearing denied*, 235 F. 2d 129, *cert. denied*, 352 U.S. 892 (1956); *Baskin v. Brown*, supra, 174 F. 2d at 394.

None of the Petitioner's factual assertions support the inference that Judge Higginbotham has a "manifestly closed mind on the merits of the case." *United States v. Grinnel Corp.*, 384 U.S. 563, 583 (1966). To the contrary, the Judge's remarks reveal an impartiality that transcends his background (i.e., his race) and his associations (i.e., his affiliation with the civil rights movement). Under these circumstances, recusal was not warranted and Judge Higginbotham had a duty to continue sitting on this case, *Laird v. Tatum*, supra.

B. The Decision Below Does Not Conflict With This Court's Decision in Berger v. United States, 255 U.S. 22 (1921)

The Petitioner's request for the issuance of the Writ alleges that the failure of Judge Higginbotham to disqualify himself directly conflicted with the Court's decision in *Berger*, supra. That argument is specious.

In *Berger*, the parties seeking disqualification of the trial judge were German-Americans who were being tried under the Espionage Act of 1917. Their affidavit supporting recusal alleged that the Honorable Kenesaw Mountain Landis had made statements

to the affect that all German-Americans were disloyal to the United States. *Berger*, supra, 255 U.S. at 28-29. It was also alleged that Judge Landis described other German-American defendants before him as "reeking with disloyalty", *id.* From these statements it was reasonable to infer that German-American defendants in criminal prosecutions under the Espionage Acts might not receive a fair trial from Judge Landis. *Cf. United States v. Townsend*, 478 F. 2d 1072 (3rd Cir. 1973).

The instant factual situation is clearly distinguishable from *Berger*, supra. Petitioner did not allege, nor could it, that Judge Higginbotham's remarks referred to the litigants before him personally, or as members of a class for which he had personal animus. Furthermore, Judge Higginbotham's statements when specifically analyzed in the context of the litigation pending before him lend support to an inference of impartiality; i.e. personal commitment to the advancement of civil rights tempered by proper judicial restraint.

Contrary to Petitioner's assertion, the decision to deny the motion for disqualification is not in conflict with this Court's decision in *Berger v. United States*, supra.

C. This Case Does Not Present a Conflict Among the Circuits for This Court To Resolve

---

The Petitioner would have this Court issue the Writ on the purported ground that the decision of the Third

Circuit Court of Appeals, denying their petition for a writ of mandamus and/or prohibition, created a conflict among the circuits. Specifically, the Petitioner contends that the Third Circuit refused to review the District Court's order denying recusal because it lacked jurisdiction to do so. This ruling, the Petitioner concludes, conflicts with decisions of a majority of the circuits holding that there is jurisdiction under the All Writs Statute, 28 U.S.C. §1651, to review a denial of a motion for disqualification.

Because the factual predicate of the Petitioner's argument is mistaken, this case presents no conflict among the circuits for this Court to resolve. Contrary to the contention of the Petitioner, the Third Circuit did not deny their mandamus/prohibition petition on jurisdictional grounds. Its order stated:

> *Upon consideration* of the Petition for Writ of Mandamus and/or Prohibition, it is
>
> ORDERED that the Petition be and the same is *denied.* (Emphasis added.) (Pet. App. A-145)

If the Court of Appeals had dismissed the petition for want of jurisdiction, as Petitioner asserts, it would have so stated as it did in the denial of the motion for a stay of proceedings pending determination of a writ of certiorari (Pet. App. A-149 to A-150).

Petitioner argues that in not holding a hearing, the Court of Appeals denied Petitioner due process under the Fifth Amendment (Pet. at 6-7). This argument is totally frivolous. This Court has specifically held that under 28 U.S.C. §144 the only judicial decision to be made is one of law; the alleged facts must

be assumed as true and no evidentiary hearing is permitted. *Berger*, supra, 255 U.S. at 365. If, on the other hand, the Petitioner contends that it was denied due process of law by the refusal of the Court of Appeals to permit oral argument in this case, their argument would be equally futile. *See F.C.C. v. WJR, The Goodwill Station*, 337 U.S. 265, 276 (1949); *accord, NLRB v. Local No. 42, International Association of Heat and Frost Insulators and Asbestos Workers*, F. 2d , 16 F.R. Serv. 2d 1583 (3rd Cir. 1973).[5]

In sum, the manner in which the Court of Appeals disposed of the petition for mandamus and/or prohibition presents no question for review by this Court. This Court should refuse to issue a writ of certiorari on that ground.

IV.
CONCLUSION

The instant petition for writ of certiorari, when gleaned in terms of the issues presented by an accurate statement of the facts, presents no novel or difficult question for resolution by this Court.

Judge Higginbotham's refusal to recuse himself was correctly based on a long line of precedents following

[5] In fact, because of the need for expeditious decision on a petition for writ of mandamus and/or prohibition, Rule 21(b) of the F. R. App. Proc. provides: "If the court is of the opinion that the writ should not be granted, it shall deny the petition", without waiting for the respondent to file an answer.

this Court's decision in *Berger*. It has been reviewed by the Court of Appeals for the Third Circuit, which properly affirmed. It is respectfully submitted therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

ROBERT P. KANE
Attorney General

BURTON MORRIS
Deputy Attorney General
Department of Justice
Capitol Annex
Harrisburg, Pa. 17120
Counsel for Respondent Commonwealth of Pennsylvania

HAROLD I. GOODMAN

MARK B. SEGAL

CASSANDRA M. MENOKEN
Community Legal Services, Inc.
Sylvania House
Juniper and Locust Streets
Philadelphia, Pa. 19107

ROBERT J. REINSTEIN
Temple University
School of Law
1715 North Broad Street
Philadelphia, Pa. 19122
Counsel for Individually Named and Class Respondents